90-364

No. _____

In The

Supreme Court of the United States

October Term, 1990

IN THE INTEREST OF:
ELEANOR ARMELL, a minor

Petitioner,

vs.

THE PRAIRIE BAND OF
POTAWATOMI INDIANS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a neglected Indian child has a statutory right under the Indian Child Welfare Act ("ICWA") and a constitutional right under the Due Process Clause to an evidentiary hearing on the question of whether good cause exists not to transfer her custody proceedings from the state court to a tribal court.

2. Whether the best interest of the child principle which informs all child custody proceedings and is explicit in the ICWA's congressional declaration of policy must be taken into account in determining whether there is good cause not to transfer child custody proceedings to a tribal court.

PARTIES

The parties in this case are the Petitioner, Eleanor Armell, a minor, through her court-appointed attorney and guardian *ad litem*, Patrick T. Murphy, Public Guardian of Cook County, and the Respondent, the Prairie Band of Potawatomi Indians.

The Petitioner herein was a party respondent in the Juvenile Division of the Circuit Court of Cook County, Illinois, the Appellant in the Illinois Appellate Court and the Petitioner in the Illinois Supreme Court.

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The order of the Illinois Supreme Court has been published at 132 Ill.2d 545, 555 N.E.2d 374, 144 Ill.Dec. 255 (1990), and is attached as Appendix A. The opinion of the Illinois Appellate Court is published at 194 Ill.App.3d 31, 550 N.E.2d 1060, 141 Ill.Dec. 14 (1990), and is attached as Appendix B. The decision of the Juvenile Division of the Circuit Court of Cook County is an unpublished order and is attached as Appendix C.

JURISDICTION

The order of the Illinois Supreme Court was entered on June 1, 1990. Jurisdiction to review the order of the Illinois Supreme Court is conferred upon this court by 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

AMENDMENT XIV, SECTION 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. 25 U.S.C. § 1902 (1983).

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe. 25 U.S.C. § 1911(b) (1983).

STATEMENT OF THE CASE[1]

On April 15, 1985, Eleanor Armell, then three and one half years old, was found scavenging through a garbage can in an alley in the Uptown neighborhood of

[1] The Statement of the Case is a summary of the statement of facts set forth in the Illinois Appellate Court opinion at pages 16-17 (Appendix B).

Chicago. Eleanor had an active, untreated case of tuberculosis. Michelle Powless, Eleanor's undomiciled mother, could not be located until sometime later.

The Division of Child Protective Services of the Illinois Department of Children and Family Services (DCFS) conducted an investigation which included interviews with a relative and with social workers from the Winnebago tribe and various agencies, including American Indian organizations. The investigation indicated that Eleanor's deceased father and Eleanor belonged to the Winnebago tribe. Pursuant to the provisions of the ICWA, that tribe was notified and became involved in the case.

On April 17, 1985, after a hearing in the juvenile court, temporary custody of Eleanor was awarded to DCFS which then placed her with her maternal great aunt. On May 3, 1985, after her aunt requested her removal, Eleanor was placed in the foster home of Petty Officer and Mrs. Paul Swett in Great Lakes, Illinois. As a member of the Menomenee tribe, Mrs. Swett immediately involved Eleanor in Menomenee tribal activities and has continued to educate Eleanor about her Indian heritage and culture.

After temporary custody was awarded to DCFS, Eleanor's case was continued to give the Winnebago tribe an opportunity to intervene. On September 20, 1985, Michelle Powless, Eleanor's mother, objected to a motion by the Winnebago tribe to transfer the case to its tribal court pursuant to the ICWA. That objection by Eleanor's mother effectively barred transfer of the case to the Winnebago tribal court. On May 5, 1987, the Winnebago tribe again intervened and filed another petition to transfer

jurisdiction and dismiss the case. On July 20, 1987, Eleanor's mother again objected to the transfer of jurisdiction to the Winnebago tribal court.

On October 6, 1987, the date set for trial, the Winnebago tribe filed an emergency motion to stay foster care placement, arguing that placement with the foster family was improper because the "minor child presently is placed in a foster care placement with a family where the father is not Native American and the mother is not Winnebago or Potawatomi." This motion, filed almost two and a half years after the case was initiated, provided the first indication that Michelle Powless was a member of the Potawatomi, not the Winnebago tribe. The circuit court continued the case pending notification of the Potawatomi tribe to determine whether Eleanor's mother was a Potawatomi and, if so, to ascertain whether the Potawatomi tribe wished to intervene.

On October 21, 1987, the Potawatomi tribe informed the court that Powless was an enrolled member of the Prairie Band of Potawatomi Indians and that Eleanor, although not a member, was eligible for enrollment in the tribe. On November 17, 1987, the Potawatomi tribe entered an appearance and filed a motion to transfer jurisdiction to the tribal court and to dismiss the case. On December 10, 1987, Eleanor was enrolled as a member of the Potawatomi tribe, without the knowledge or consent of DCFS, her temporary custodian. On December 18, 1987, Eleanor's mother, through her counsel the Public Defender, informed the court that she did not object to the Potawatomi tribe's motion to transfer of jurisdiction. Neither the Winnebago tribe nor the State's Attorney objected to transfer. DCFS made no response. The Public

Guardian, as court-appointed attorney and guardian *ad litem* ("GAL") for Eleanor, objected to transfer, asserting that "good cause" existed for Illinois to retain jurisdiction of this case because it would not be in the child's best interest for the Potawatomi tribe to exercise jurisdiction.

Eleanor's attorney and GAL then sought discovery to present certain evidence to the court. After Eleanor's mother and the Winnebago tribe objected, arguing that only factual issues, not legal issues were involved, the circuit court quashed the notices of deposition which had been sent by Eleanor's attorney and GAL.

On March 18, 1988, after presentation of written briefs and oral arguments, the circuit court found that good cause did not exist for Illinois to retain jurisdiction of this case and transferred jurisdiction to the Potawatomi tribal court.

During the pendency of this case, Eleanor has continued to live in the home of Petty Officer and Mrs. Swett. In the summer of 1987, Swett was transferred to California. Because of her highly negative reaction to the prospect of removal from the Swett home, Eleanor was allowed by DCFS and the court, over the objections of the Winnebago tribe, to move to California with the Swett family. Eleanor has therefore lived with her foster family for more than half of her eight years of life.

ARGUMENT

The decision of the Illinois Appellate Court merits review because it gives this Court the opportunity to rule on two important questions: (1) whether the ICWA and the Due Process Clause entitle a neglected Indian child to an evidentiary hearing on the question of whether good cause exists not to transfer jurisdiction of her custody proceedings from the state court to the tribal court and (2) whether "the best interest of the child" test is implicit in the ICWA good cause provision.

A. EVIDENCE OF GOOD CAUSE

In this case, Eleanor, an eight-year-old neglected Indian child, was deprived of the opportunity to present the state court with evidence of the hardship she would suffer if her custody proceedings were transferred to the jurisdiction of a tribe in another state with whom she had never had any contact. There is no question that the tribal court has the ability and, upon transfer, the authority to decide the question of Eleanor's custody. However, the ICWA and Due Process principles require that Eleanor be given the opportunity to present evidence on the good cause question *prior* to the transfer decision.

Under the ICWA, the state court has the authority to prevent the transfer of an Indian child's custody proceedings to the jurisdiction of a tribal court when there is good cause not to transfer. 25 U.S.C. §1911(b) (1983). Bureau of Indian Affairs guidelines indicate that good cause not to transfer child custody proceedings from the state to the tribal court exists when, *inter alia*, "[t]he

evidence necessary to decide the case could not be adequately presented in the trial court without undue hardship to the parties or the witnesses." 44 Fed. Reg. 67,591 (1979). Here, Eleanor's lawyer and guardian *ad litem* sought discovery in order to gather evidence of undue hardship to present to the trial court. However, after Eleanor's mother and the Winnebago Tribe objected that the case presented no factual but only legal issues, the trial court quashed Eleanor's notices of deposition. On the basis of the written briefs and oral argument of the legal issues alone the trial court found that good cause did not exist and transferred jurisdiction to the Potawatomi tribal court. (Appendix C at 22).

A determination of undue hardship requires findings of fact, not law. The trial court made a decision that good cause did not exist without any factual inquiry. This clearly violates due process principles, as well as established ICWA caselaw. *See, e.g., In the Matter of the Dependency and Neglect of A.L.*, 442 N.W.2d 233 (S.D. 1989) (the state's attorney and the children's attorney, who opposed transfer, submitted exhibits and witnesses in support of their objection to transfer and the trial court entered findings of fact and conclusions of law on the transfer question), *In the Matter of G.L.O.C.*, 205 Mont. 352, 668 P.2d 235 (1983) and *In the Matter of M.E.M.*, 145 Mont. 329, 635 P.2d 1313 (1981) (a jurisdictional hearing is required before a ruling on a transfer question), *In the Matter of G.L.O.C.*, 205 Mont. 352, 668 P.2d 235 (1983) and *In the Matter of M.E.M.*, 145 Mont. 329, 635 P.2d 1313 (1981) (a jurisdictional hearing is required before a ruling on a transfer request.) The Illinois Appellate Court erroneously failed to consider the nature of the hearing in this

case, apparently equating the hearing of legal argument here with the jurisdictional hearing required under the ICWA and the due process clause (Appendix B at 11). Elementary principles of due process, the plain meaning of the ICWA and the relevant caselaw all require more than legal argument on the question of good cause. The appellate court's failure is particularly egregious because one of the purposes of the ICWA is to insure due process to those involved in the process of transferring jurisdiction. *G.L.O.C.*, 668 P.2d at 237-38.

In this case, the trial court should have permitted Eleanor to present evidence that she and her witnesses would suffer undue hardship in attempting adequately to present her case to the tribal court, including evidence that Eleanor experienced severe emotional trauma when first faced with the possibility of going to a hearing, as well as expert psychiatric and psychological testimony concerning what effect transferring the case to the tribal court in Kansas would have on Eleanor. Eleanor, after all, has had absolutely no contact with the tribe, and she did not even become a member of the tribe until after she had been involved in juvenile court proceedings for more than two and a half years. Eleanor, now eight years old, has lived with her foster parents since she was three and a half years old, and has become closely bonded to them. Eleanor should have been permitted to present evidence that she became ill when presented with the prospect that she might have to leave her foster parents. In addition, Eleanor has a relationship with the attorney who was appointed to represent her in juvenile court. The same attorney could not represent her in the tribal court. Moreover, all of the witnesses to the neglect and abandonment

of Eleanor reside in Chicago. More importantly, the primary witnesses to the relationship Eleanor has developed with her foster parents also live in Chicago. The expense of transporting these individuals to testify before the tribal court in Kansas would be prohibitive. All of these matters go to the question of undue hardship. Eleanor is entitled to a hearing to present this evidence to the trial court prior to the transfer decision.

The trial court also failed to consider evidence on the separate, equitable basis for refusing transfer. For two and a half years Eleanor's mother exercised her statutory right to object to transfer of jurisdiction to the Winnebago tribal court "despite ample opportunity to divulge her actual tribal affiliation while judicial proceedings progressed." Appendix B at 15. During these two and a half years Eleanor became so attached to her foster parents that she became physically ill when she learned that she might have to be separated from them. Upon hearing evidence, the trial court could determine that Eleanor's mother initially objected and later agreed to transfer, because she was concerned about the close relationship Eleanor has developed with her foster parents. Such a motive would constitute an equitable basis to deny transfer. Although the appellate court stated that there is no evidence that Eleanor's mother purposefully deceived the Illinois child welfare agency or Eleanor's attorney, the trial court never heard any evidence on this issue.

B. BEST INTEREST OF THE CHILD

The opinion of the Illinois Appellate Court also affords this Court the opportunity to determine whether

the best interest of the child test should be read into the jurisdictional good cause provision of the ICWA. The Illinois Appellate Court determined that the best interests of the child are relevant "not to determine jurisdiction but to ascertain placement." Appendix B at 11. However, to limit the best interest of the child test to decision-making about placement is contrary to the express policy declaration of the Act: "to protect the best interests of Indian children", 25 U.S.C. § 1902 (1983). The best interest of the child principle informs all child custody proceedings and applies to custody proceedings as a whole. The best interest of the child test has not been and should not be restricted to the question of placement only.

Here, Eleanor sought to present evidence that forcing her to submit to custody proceedings in a place to which she was unaccustomed would cause her a great deal of emotional harm. Thus, transferring her case to the tribal court would not be in her best interest. The courts erred in failing to consider Eleanor's best interest.

The Illinois Appellate Court held that the best interest of the child considerations in Illinois law are inapplicable to the ICWA's jurisdictional requirements, on the ground that Congress intended the ICWA to foster nationwide uniformity of terms that should not be frustrated by state law. However, the best interest of the child test is not unique to Illinois. In *Ford v. Ford*, 371 U.S. 187, 193, 83 S.Ct. 273, 276 (1962), this Court recognized that "probably every State in the Union requires the court to put the child's interest first." The ICWA does not change the cardinal rule that the best interests of the child are paramount. *In re Interest of Bird Head*, 213 Neb. 741, 331 N.W.2d 785, 791 (1983). Indeed, the ICWA incorporates

the best interest test as a matter of policy with specific reference to the Indian child. Thus, both nationwide uniformity of terms and the policy of the ICWA are furthered by reading the best interest test into the jurisdictional proceeding.

Moreover, it is error for the juvenile court to ignore the best interest of the child at any stage of custody proceedings. The juvenile court has been described as a statutory extension of the ancient right of the sovereign, acting as *parens patriae* through a court of chancery, to protect infants. 47 Am. Jur. 2d Juvenile Courts §§14-16 (1969). Established English common law gave the king, as *parens patriae*, the duty to look after those who are incapable of caring for themselves because of their tender years or imbecility of mind. 15A C.J.S. Common Law §§1 and 2 (1945); *see also* 43 C.J.S. Infants §6 (1978). The concept of the sovereign's duty to look after infants and others who could not take care of themselves "is of ancient origin, having been observed in the Roman law of the Twelve Tables, whence it was accepted in England as a direct prerogative of the crown." *In re Sariyanis*, 19 N.Y.S.2d 431, 434, 173 Misc. 881 (1940), *quoted in* 44 C.J.S. Insane Persons §3 (1967). Thus, the juvenile court undermines its own *raison d'etre* if it refuses to consider the best interest of the child at the point of determining jurisdiction.

For these reasons, the Petitioner, Eleanor Armell, respectfully asks this Court to grant a writ of certiorari to the Illinois Supreme Court.

Respectfully submitted,

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of Cook County

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APPENDIX A

ILLINOIS SUPREME COURT
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June 1, 1990

Mr. Patrick T. Murphy
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No. 69967 – In the Interest of: Eleanor Armell, a Minor, petitioner, v. The Prairie Band of Potawatomi Indians, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 25, 1990.

APPENDIX B

In the Interest of Eleanor ARMELL, a minor,

No. 1-88-1003.

Appellate Court of Illinois,
First District, Second Division.

Jan. 16, 1990.

Rehearing Denied Feb. 13, 1990.

Presiding Justice DiVITO delivered the opinion of the court:

The Public Guardian appeals from the circuit court order dismissing the neglect and dependency proceeding in the juvenile court and transferring the case to the jurisdiction of the tribal court of the Prairie Band of Potawatomi Indians (Potawatomi tribe) pursuant to the provisions of the Indian Child Welfare Act (ICWA) (92 Stat. 3069, 25 U.S.C. §§ 1901-1963 (1978)). As attorney for the minor respondent, the Public Guardian contends that: (1) under the provisions of the ICWA, good cause existed for the circuit court not to transfer jurisdiction of the case; (2) if the ICWA is interpreted to permit jurisdiction by the tribal court, it is unconstitutional; and (3) the circuit court lacked subject matter jurisdiction.

On April 15, 1985, Eleanor Armell, who was born on November 5, 1981, and was then 3½ years old, was found going through a garbage can in an alley in the Uptown neighborhood of Chicago. Eleanor was found to have an active, untreated case of tuberculosis. Michelle Powless, Eleanor's undomiciled mother, could not be found until sometime later.

The Division of Child Protective Services, a division of the Illinois Department of Children and Family Services (DCFS), conducted an investigation which included interviews with a relative and social workers from various social agencies, including American Indian Organizations and the Winnebago tribe. The investigation, at that time, indicated that Eleanor's deceased father, Powless, and Eleanor belonged to the Winnebago tribe. Pursuant to the provisions of the ICWA, that tribe was notified and became involved in the case.

On April 17, 1985, after a hearing in the juvenile court, temporary custody of Eleanor was awarded to DCFS which then placed her with her maternal great aunt. On May 3, 1985, after removal from her aunt's home at her aunt's request, Eleanor was placed in the foster home of Petty Officer and Mrs. Paul Swett in Great Lakes, Illinois. An American Indian and a member of the Menomenee tribe, Mrs. Swett immediately involved Eleanor in the activities of the Menomenee tribe and has continued to educate Eleanor about her Indian heritage and culture.

After temporary custody had been given to DCFS, the case was continued to give the Winnebago tribe an opportunity to intervene. On September 20, 1985, Powless objected to a motion by the Winnebago tribe to transfer the case to its tribal court pursuant to the ICWA. That objection by Eleanor's mother effectively barred transfer of the case to the Winnebago tribal court. (See 25 U.S.C. § 1911(b) (1978).) On May 5, 1987, the Winnebago tribe again intervened and again filed a petition to transfer

jurisdiction and dismiss the case. On July 20, 1987, Powless again objected to the transfer of jurisdiction to the Winnebago tribal court.

On October 6, 1987, the date set for trial, the Winnebago tribe filed an emergency motion to stay foster care placement, arguing that placement with the foster family was improper because the "minor child presently is placed in a foster care placement with a family where the father is not Native American and the mother is not Winnebago or Potawatomi." This motion provided the first indication that Michelle Powless was not a Winnebago Indian, but a Potawatomi Indian. The circuit court continued the case pending notification of the Potawatomi tribe to determine whether Eleanor's mother was a Potawatomi and, if so, to ascertain if the Potawatomi tribe wished to intervene.

On October 21, 1987, the Potawatomi tribe informed the court that Powless was an enrolled member of the Prairie Band of Potawatomi Indians and that Eleanor was not a member, but was eligible for enrollment in the tribe. On November 17, 1987, the Potawatomi tribe entered an appearance and filed a motion to transfer jurisdiction and dismiss the case. On December 10, 1987, Eleanor was enrolled as a member of the tribe, without the knowledge or consent of her temporary custodian, DCFS. On December 18, 1987, pursuant to the Potawatomi tribe's motion for transfer, Powless, through her counsel the Public Defender, informed the court that she did not object to transfer of jurisdiction. Neither the Winnebago tribe nor the State's Attorney objected to transfer. DCFS made no response. The Public Guardian, as Eleanor's attorney, objected to transfer, asserting that "good cause" existed

for Illinois to retain jurisdiction of this case because it would not be in the child's best interest for the Potawatomi tribe to exercise jurisdiction.

The Public Guardian then sought discovery to present certain evidence to the court. After Powless and the Winnebago tribe objected, arguing that there were no factual issues and that only legal issues were involved, the circuit court quashed the notices of deposition which had been sent by the Public Guardian.

On March 18, 1988, after presentation of written briefs and oral arguments, the circuit court found that good cause did not exist for Illinois to retain jurisdiction of this case and ordered that jurisdiction be transferred to the Potawatomi tribal court. The Public Guardian filed a notice of appeal on the same day, and the circuit court granted a stay of the order until March 31, 1988. On that day, the Public Guardian, as counsel for Eleanor, filed an emergency motion with this court for stay of the circuit court order. This court initially granted a temporary stay pending receipt of briefs on the issue, and, on April 13, 1988, this court denied a permanent stay. On April 18, 1988, the Public Guardian filed a motion for supervisory order with the Illinois Supreme Court requesting a stay of the circuit court order. The Potawatomi tribe filed its objection to this motion on April 23, 1988. On April 27, 1988, while there was no stay of the circuit court order in effect, the Potawatomi tribal court convened and affirmatively accepted jurisdiction of the proceeding. After the tribal court ordered that temporary custody of Eleanor be awarded to the tribe's social service agency pending an investigation to determine the best possible placement for her, that agency determined that Eleanor should remain

with her present foster parents while it made its investigation.

On May 3, 1988, the Illinois Supreme Court entered a supervisory order staying enforcement of the circuit court's order pending the appeal. Subsequently, on May 13, 1988, the Public Guardian requested that the circuit court set a status hearing in the juvenile case. Counsel for the Potawatomi tribe, counsel for the Winnebago tribe, the State's Attorney, and the Public Defender as Powless' lawyer responded to this motion by arguing that the May 3, 1988 order of the Illinois Supreme Court staying all proceedings was unenforceable because the Potawatomi tribal court had entered its order on April 27, 1988, which effectively deprived the supreme court of jurisdiction. The circuit court refused to enter an order and struck the case from its call, stating it did not have jurisdiction and that it needed further direction from the Illinois Supreme Court.

The Public Guardian then filed a motion in the supreme court for a further supervisory order. Relying upon the April 27, 1988 tribal court order and the provision of the ICWA which requires states to give full faith and credit to tribal court orders in child custody proceedings (25 U.S.C. § 1911(d) (1978)), the Potawatomi tribe, joined by the State's Attorney and the Public Defender, filed a motion for reconsideration of the supervisory order. On August 24, 1988, the Illinois Supreme Court entered an order affirming its previous entry of the supervisory order.

During the pendency of this case, Eleanor has continued to live in the home of Petty Officer and Mrs. Swett. In

the summer of 1987, Swett was transferred to California. Because of her highly adverse reaction to the prospect of removal from the Swett home, Eleanor was allowed by DCFS and the court, over the objections of the Winnebago tribe, to move to California with the Swett family. Eleanor has therefore lived with her foster family for more than half of her 8 years of life.

The Indian Child Welfare Act (ICWA)

The ICWA of 1978 (92 Stat. 3069, 25 U.S.C. §§ 1901-1963 (1978)), was enacted to prevent the results of the separation of large numbers of Indian children from their families and tribes caused by adoption or foster care placement in non-Indian homes by state child welfare entities. The Congressional findings that were incorporated into the ICWA reflect the sentiment that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children. (25 U.S.C. § 1901 (1978).) Hence, the ICWA provides Indian tribes jurisdiction to determine child placement and adoption.

At the core of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. Section 1911 provides a dual jurisdictional scheme. Section 1911(a) establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child "who resides or is domiciled within the reservation of such tribe . . . ". Section 1911(b), the section applicable to the case at bar, creates tribal jurisdiction in cases involving children not domiciled on the reservation. It states:

> "In any State court proceeding for the foster care placement of, or termination of parental

> rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, *in the absence of good cause to the contrary,* shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided,* That such transfer shall be subject to declination by the tribal court of such tribe." (emphasis added) 25 U.S.C. § 1911(b) (1978).

I. "Good Cause" Issues

The Public Guardian initially contends that, in this case, there was "good cause" not to transfer jurisdiction to the Potawatomi tribal court. The burden of establishing good cause not to transfer is on the party opposing the transfer. 44 Fed.Reg. 67,591 (1978).

The Public Guardian argues that in determining whether there was "good cause" not to transfer jurisdiction, the circuit court should have: a) considered the best interests of Eleanor; b) determined whether there was a good faith compliance with the ICWA; c) applied *forum non conveniens* considerations; and d) ruled that Eleanor's mother should have been estopped from consenting to the transfer.

A

The Public Guardian argues that pursuant to the ICWA and Illinois law the circuit court should have taken into account the best interests of Eleanor in deciding whether good cause existed not to transfer the case. He contends that when ascertaining whether good cause

existed, the circuit court should have interpreted section 1911(b) in conjunction with section 1902, which states that a policy of the ICWA is to protect the best interests of Indian children. He argues that in determining the existence of good cause, the circuit court should have considered such factors as the psychological effects of a transfer on Eleanor. Relying upon *In the Matter of G.L.O.C.* (1988), 205 Mont. 352, 668 P.2d 235, 238, and *In the Matter of M.E.M.* (1981), 195 Mont. 329, 635 P.2d 1313, 1317, the Public Guardian maintains that failure to consider these factors and the child's best interests constituted reversible error. We disagree.

The two cases relied upon by the Public Guardian are not relevant to a determination of the existence of good cause under Section 1911(b). Both *In the Matter of M.E.M.* and *In the Matter of G.L.O.C.* are authority that a hearing must be held, with counsel representing the parents, to determine whether good cause exists not to transfer. (*In the Matter of M.E.M.*, 635 P.2d 1313, 1317; *In the Matter of G.L.O.C.*, 668 P.2d 235, 237.) In the instant case, a hearing was held in which all parties were represented by counsel and in which the issue was whether good cause existed not to transfer jurisdiction.

What is good cause not to transfer jurisdiction is set forth by the Department of the Interior, Bureau of Indian Affairs (BIA) which has published guidelines for the implementation of the ICWA. (Guidelines for State Courts; Indian Child Custody Proceedings (1979), 44 Fed.Reg. 67,584 *et seq.* (1978).) The BIA guidelines, while not controlling, must be accorded great weight in construing the ICWA. *Batterton v. Francis* (1977), 432 U.S. 416, 424, 97 S.Ct. 2399, 2404, 53 L.Ed.2d 448.

The BIA guidelines state that good cause not to transfer exists when the child's tribe does not have a tribal court or when any of the following circumstances exists:

> "(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
>
> (ii) The Indian child is over twelve years of age and objects to the transfer.
>
> (iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
>
> (iv) the parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe." 44 Fed.Reg. 67,591 (1978).

Moreover, the BIA guidelines state that socio-economic conditions and the perceived adequacy of tribal or BIA social services may not be considered in determining whether good cause exists. Commentary to this section of the BIA guidelines stresses that an Indian child's lack of present contacts with a tribe or reservation should not be used to justify denying transfer, since tribes have a transcendent interest in developing a relationship with their members (BIA Guidelines, sec. C.3. Commentary, 44 Fed.Reg. 67,591 (1978).) The case law supports the definition of "good cause" under Section 1911(b) propounded by the BIA. See *In re Junious* (1983), 144 Cal.App.3d 786, 193 Cal.Rptr. 40, 46 (the child's lack of contacts with a tribe or his inability to form any sort of tribal identification does not prevent transfer of jurisdiction); *In re Appeal in Coconino County Juvenile Action* (1987), 153 Ariz. 346,

736 P.2d 829 (the fact that an Indian child had been living in a non-Indian home is not a reason not to adhere to the jurisdictional provision of the ICWA).

Moreover, considerations involving the best interests of the child are relevant not to determine jurisdiction but to ascertain placement. (See *Mississippi Band of Choctaw Indians v. Orrey Curtiss Holyfield* (1989), 490 U.S. ___, 109 S.Ct. 1597, 104 L.Ed.2d 29; *Matter of Appeal in Pima County Juvenile Action* (Ariz.App.1981), 130 Ariz. 202, 203, 685 P.2d 187, 188, *cert. den. sub. nom. Catholic Social Services of Tucson v. P.C.* (1982), 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875.) For example, the Utah Supreme Court held in *In re Adoption of Halloway* (Utah 1986), 732 P.2d 962, 971-972, that issues of bonding and ultimate placement of the child were not proper considerations when the circuit court was deciding the issue of jurisdiction. We conclude, based upon all the foregoing, that, though any psychological effects the transfer may have on Eleanor may properly be considered when ascertaining placement, they are not factors which should be considered when deciding jurisdiction. Accordingly, the circuit court's order quashing the notice of depositions whose intent was to discover what psychological effect a transfer might have on Eleanor, was correct.

We find no merit in the Public Guardian's argument that because Illinois law requires that in juvenile proceedings the best interests of the child are of paramount importance (see, *e.g.*, Ill.Rev.Stat. 1987, ch. 37, par. 801-2(3)(c); *Moseley v. Goldstone* (1980), 89 Ill.App.3d 360, 369, 44 Ill.Dec. 779, 786, 411 N.E.2d 1145, 1152), good cause not to transfer jurisdiction exists in this case since transfer is against Eleanor's best interests. The United

States Supreme Court in *Mississippi Band of Choctaw Indians v. Orrey Curtiss Holyfield*, 490 U.S. ___, ___, 109 S.Ct. 1597, 1608, 104 L.Ed.2d 29, 46, in interpreting Section 1911(a) of the ICWA, reasoned that when Congress enacted the ICWA, it intended nationwide uniformity of terms and that state laws should not frustrate that intention. Therefore, the ICWA's provision regarding "good cause" not to transfer jurisdiction should not be interpreted by individual state law. Illinois' best-interest-of-the-child considerations are therefore inapplicable to ICWA's jurisdictional requirements.

In *Choctaw*, though three years had elapsed since the children involved in that case had been adopted, the Supreme Court held that the legal question to be decided was *who* was to make the custody determination, "not what the outcome of that determination should be." (*Mississippi Band of Choctaw Indians v. Orrey Curtiss Holyfield*, 490 U.S. ___, ___, 109 S.Ct. 1597, 1611, 104 L.Ed.2d 29, 50.) In pertinent part, the Court stated,

> "It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe – and perhaps the children themselves – in having them raised as part of the Choctaw community. Rather 'we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy' " *Mississippi Band of Choctaw Indians v. Orrey Curtiss Holyfield*, 490 U.S. ___, ___, 109 S.Ct. 1597, 1611, 104 L.Ed.2d 29, 50, citing *In re Adoption of Halloway*, 732 P.2d 962, 972.

We conclude that good cause not to transfer the case to the tribal court, has not been shown. As the United States Supreme Court stated in *Choctaw*, Congress

expressed a preference for the tribal court to determine these matters regardless of any psychological impact upon the child. Illinois' "best interests of the child" considerations do not provide sufficient bases to deny transfer of jurisdiction under the ICWA "good cause" provision.

B

The Public Guardian maintains that the good faith efforts made in this case to comply with the ICWA constitutes "good cause" not to transfer jurisdiction. He argues that the failure, until October 1988, of the Winnebago tribe and Powless to disclose that Powless was a member of the Potawatomi, not the Winnebago tribe, was fraud, as "fraud comprises anything calculated to deceive, as in acts, omissions and concealment including breach of legal or equitable duty, trust or confidence in damage to another and encompasses silence if accompanied by deceptive conduct or suppression of material facts constituting active concealment." (*Grane v. Grane* (1985), 130 Ill.App.3d 332, 344, 85 Ill.Dec. 561, 569, 473 N.E.2d 1366, 1374.) No cases are cited for the Public Guardian's conclusion that, given the bad faith conduct of Eleanor's mother, the good faith effort to comply with the ICWA constituted good cause not to transfer the case.

There is no evidence in this case that the pendency of these proceedings was known by the Potawatomi tribe before October 1987. The ICWA specifically provides that the child's tribe has the right to intervene at any point in the proceeding:

> "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding." 25 U.S.C. § 1911(c) (1978).

In fact, the Potawatomi tribe intervened and requested the transfer of jurisdiction immediately after it received notice of the proceedings. Neither the ICWA nor any other authority requires denial of transfer to the tribal court based upon non-disclosure by Powless of her tribal identity. The Public Guardian's good faith argument must be rejected.

C

The Public Guardian next argues that determination of "good cause" not to transfer jurisdiction necessitates the application of a modified doctrine of *forum non conveniens*. He cites the BIA guidelines that good cause not to transfer a custody proceeding involving an Indian child may exist if the "evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or witnesses." 44 Fed.Reg. 67,591 (1978).

However, the cases the Public Guardian relies upon are factually distinguishable from the instant matter. In *In re Interest of Bird Head* (1983), 213 Neb. 741, 747, 331 N.W.2d 785, 790, the court held transfer was improper because all the acts complained of occurred off the reservation and witnesses testified it would be impossible for them to attend the tribal court. (See also *In the Interest of J.R.H. and M.J.H.* (Iowa 1984), 358 N.W.2d 311, 317.) In

Matter of Adoption of Baby Boy L. (1982), 231 Kan. 199, 643 P.2d 168, the Kansas Supreme Court determined that the boy was outside the ambit of the ICWA because the mother was non-Indian.

In contrast to those cases, this case is clearly subject to the ICWA and *forum non conveniens* factors have not been shown. Social workers stated by affidavit that it would be no hardship for them to testify before the tribal court and copies of all DCFS reports have already been transmitted to the tribal court. Since Eleanor now lives in California, it cannot be said that it would be more convenient to conduct hearings in Illinois than in Kansas.

Furthermore, liberal expansion of the *forum non conveniens* doctrine would preclude transferring jurisdiction to tribal courts except in cases where the child resides on or near a reservation. Acceptance of the Public Guardian's argument in this case would be contrary to the Congressional findings and goals incorporated into the ICWA.

D

The Public Guardian next contends that Powless should be estopped from consenting to the transfer because she chose to remain silent for 2½ years, despite ample opportunity to divulge her actual tribal affiliation while judicial proceedings progressed. See *Matter of Pubs Inc. of Champaign* (7th Cir.1980), 618 F.2d 432, 438; *In re Walton Hotel Co.* (7th Cir.1940), 116 F.2d 110, 112.

There is no evidence, however, that Powless purposely deceived DCFS or the Public Guardian. Moreover,

the ICWA provides no basis to deny Powless the power to exercise her rights. We note another provision of the ICWA which gives parents the absolute right to withdraw their consent to adoption at any time up to the time a final decree of adoption is granted (25 U.S.C. § 1913(c)(1978)), and conclude that the relevant portion of the ICWA (25 U.S.C. 1911(b)(1978)), provides no basis for the imposition of estoppel in this case.

II. Constitutional Issues

The Public Guardian asserts that Section 1911(b) of the ICWA is unconstitutional as applied to Eleanor, because: (a) it is violative of the equal protection guarantee of the fourteenth amendment since it involves a suspect class to which no compelling governmental interest is implicated, or, it lacks a rational basis; and (b) it is violative of the due process clause of the fourteenth amendment since it grants jurisdiction to a tribal court over a child who has had no contacts with the tribe.

A

When federal legislation involves a suspect class, that legislation is subject to strict scrutiny and can be upheld only if necessary to promote a compelling interest. (*Doe v. Edgar* (7th Cir.1983), 721 F.2d 619, 622.) However, the ICWA does not involve a suspect class. Federal legislation with respect to Indian tribes is not based upon impermissible racial classifications, but derives from the special status of Indians as members of quasi-sovereign tribal entities. (*United States v. Antelope* (1977), 430 U.S. 641, 646, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701; *Morton v. Mancari*

(1974), 417 U.S. 535, 550-555, 94 S.Ct. 2474, 2482-2485, 41 L.Ed.2d 290. See also *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation* (1979), 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740; *Delaware Tribal Business Committee v. Weeks* (1976), 430 U.S. 73, 84-85, 97 S.Ct. 911, 919, 51 L.Ed.2d 173.) Moreover, the Commerce Clause (U.S. Const., art I, § 8), gives Congress plenary power to regulate Indians on or off a reservation and provided the congressional authority for enactment of the ICWA. H.R.Rep. No. 1386, 95th Cong., 2d Sess. 19 (1978), at 15, *reprinted in* 1978 U.S.Code Cong. & Ad. News 7530, 7537-38; see *United States v. Nice* (1916), 241 U.S. 591, 596, 36 S.Ct. 696, 697, 60 L.Ed. 1192; *United States v. Holliday* (1866), 70 U.S. 407, 418, 18 L.Ed. 182.

Furthermore, when laws which grant special treatment to Indians are rationally related to the fulfillment of Congress' unique obligation toward Indians, those legislative judgments will not be disturbed. (*Morton v. Mancari*, 417 U.S. 535, 555, 94 S.Ct. 2474, 2485, 41 L.Ed.2d 290.) The provisions of the ICWA were deemed by Congress to be essential for the protection of Indian culture and to assure the very existence of Indian tribes. Those provisions do not contravene equal protection. *Morton v. Mancari*, 417 U.S. 535, 555, 94 S.Ct. 2474, 2485, 41 L.Ed.2d 290.

Regarding the Public Guardian's contention that the ICWA lacks a rational basis, we conclude that the protection of the integrity of Indian families is a permissible goal that is rationally tied to the fulfillment of Congress' unique guardianship obligation toward Indians. *Morton v. Mancari*, 417 U.S. 535, 555, 94 S.Ct. 2474, 2485, 41 L.Ed.2d 290; *In re Angus* (1982), 60 Or.App. 546, 655 P.2d 208, 312, *cert. den.* (1983), 464 U.S. 830, 104 S.Ct. 107, 78 L.Ed.2d

109. See also *In re Guardianship of D.L.L. & C.L.L.* (S.D.1980), 291 N.W.2d 278; *In re Appeal of Pima County Juvenile Action*, 130 Ariz. 202, 635 P.2d 187, 193, *cert. den.*, 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875.

B.

The Public Guardian next argues that the assertion of jurisdiction by the Potawatomi tribal court over Eleanor, who has had no contacts with the tribe, violates the due process clause of the fourteenth amendment because Eleanor lacks "minimum contacts" with the tribe. The Public Guardian asserts that Eleanor has an interest that protects her from the imposition of jurisdiction by a forum with which she has never had any contact. (See *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 471-72, 105 S.Ct. 2174, 2181-82, 85 L.Ed.2d 528; *International Shoe v. Washington*, (1945) 326 U.S. 310, 319, 66 S.Ct. 154, 160, 90 L.Ed. 95.) The "minimum contact" argument, however, is inappropriate in this case.

Because of the Commerce Clause, Congress may constitutionally legislate even with respect to custody litigation concerning off-reservation Indian children. (H.R. Rep. No. 1386, 95th Cong., 2d Sess. 19 (1978), at 15 *reprinted in* 1978 U.S.Code Cong. & Ad. News 7530, 7537-38.) The ICWA constitutes a scheme enacted by Congress to ensure that Indian tribal members are protected, regardless of the lack of present tribal contacts. (BIA Guidelines, sec C.3 Commentary, 44 Fed.Reg. 67,591 (1978).) Dispositive of the "minimum contacts" contention of the Public Guardian is the holding of the United States Supreme Court that even without contact with the

tribe or reservation since their births, and even though their Indian parents did not want tribal involvement with their children who were never residents of the reservation, the tribal court was the appropriate forum to determine the custody of children of members of the tribe. (*Mississippi Band of Choctaw Indians v. Orrey Curtiss Holyfield*, 490 U.S. ___, ___ ___, 109 S.Ct. 1597, 1608-1609, 104 L.Ed.2d 29, 46-48.) Consequently, Eleanor's lack of contact with the Potawatomi tribe does not contravene any of her due process rights.

III. Subject Matter Jurisdiction Issue

In this reply brief, the Public Guardian asserts, for the first time, that the judgment of the circuit court should be vacated for lack of subject matter jurisdiction. This issue may be raised for the first time on appeal (*Dorr-Wood, Ltd. v. Dept of Public Health* (1981), 99 Ill.App.3d 170, 173, 54 Ill.Dec. 634, 425 N.E.2d 499), and is not waived for failure to raise it in the circuit court. (*People ex rel. Illinois Department of Human Rights v. Arlington Park Race Track Corp* (1984) 122 Ill. App.3d 517, 521, 77 ILL.Dec. 882, 461 N.E.2d 505.) The Public Guardian maintains that the Potawatomi tribe is not Eleanor's tribe for purposes of the ICWA because the Potawatomi tribe lacks any substantive interest protected by the ICWA since Eleanor; as an infant, spent some time on the Winnebago reservation with her father, and has therefore had more contacts with the Winnebago tribe.

This argument lacks merit. The ICWA defines an Indian child's tribe as:

> "(a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with whom the Indian child has the more significant contacts." 25 U.S.C. § 1903(5)(a), (b).

The Potawatomi tribe has standing since Eleanor is an enrolled member of that tribe. Since section 1908 uses the disjunctive, the provisions under either (a) or (b) may be applied. Moreover, the Winnebago tribe indicated that it supports the transfer to the Potawatomi tribe.

As pointed out previously, under the ICWA, even in instances where there is a total lack of contact with a child, an Indian tribe has a very real and substantive interest in each child. (See *Mississippi Band of Choctaw Indians v. Orrey Curtiss Holyfield*, 490 U.S. ___, 109 S.Ct. 1497, 104 L.Ed.2d 29.) The Potawatomi tribe is Eleanor's tribe under the ICWA and therefore transfer to its tribal court is proper.

Conclusion

In concluding that there is no good cause not to transfer this case to the Potawatomi tribal court, that the ICWA is not unconstitutional as applied in this case, and that the circuit court possessed subject matter jurisdiction, we are not unmindful of the potentially disruptive effect transfer of this case to the tribal court could have on Eleanor. As stated previously, however, our determinations in this case are related not to placement but to jurisdictional considerations. We note that the first order

entered by the Potawatomi tribal court was to have Eleanor remain with her foster parents while appropriate investigations were conducted. That order reflected great sensitivity to an aspect of this case which gives it its uniqueness: that largely because of Eleanor's mother's failure to disclosure her tribal identity for 2½ years, transfer was unavoidably delayed and that, as a result, significant bonding has occurred between Eleanor and the family with which she has so long resided. We have no reason to believe that the Potawatomi tribal court, given the unique aspects of this case, will not continue to be sensitive to the best interests of Eleanor.

The circuit court's order is affirmed.

AFFIRMED.

HARTMAN and SCARIANO, JJ., concur.

APPENDIX C

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

In the Interest of Eleanor Armell, a minor	)	FILED MAR 18 1988
v.	)	No. 85 J 05027 Calendar 16

ORDER

This cause having come before the court on the Motion to Transfer Jurisdiction and Dismiss Case brought by the Prairie Band of Potawatomi Indians, the Court having reviewed the briefs submitted by the parties and having heard the arguments of the parties;

It is hereby Ordered and the Court finds as follows:

1. The Court finds that no good cause exists for this Court to retain jurisdiction of the case.

2. This case is transferred to the Administrative Body of the Prairie Band of Potawatomi Indians and this case is dismissed in Illinois.

3. Enforcement of this Order is stayed until March 31, 1988.

Atty No. 90761

Name Duane B. LaPlant

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Address Sidley & Austin
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Telephone 312/853-7168

3/18/88

ENTER:

/s/ Claude Whitaker
Judge

Judge's No.
000193

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY